BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEDRO SILVA, JR. Claimant VS. **NATIONAL BEEF PACKING COMPANY** Respondent AND **ITT HARTFORD** Insurance Carrier	)	Docket No. 152,487

ORDER

Both the claimant and the respondent and its insurance carrier appeal from an Award entered by Administrative Law Judge Thomas F. Richardson on July 28, 1994.

APPEARANCES

Claimant appeared by his attorney Harold K. Greenleaf of Liberal, Kansas. Respondent and its insurance carrier appeared by their attorney James H. Morain of Liberal, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board adopts the stipulations listed in the Award.

ISSUES

On appeal both claimant and respondent ask for review of the findings and conclusions regarding the nature and extent of claimant's disability. The claimant also raises an issue concerning the failure to award certain medical expenses as authorized medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and considered the arguments of the parties, the Appeals Board finds and concludes as follows:

(1) Claimant is entitled to benefits based upon a twenty-five percent (25%) permanent partial functional disability from the date of accident until his last date worked of June 4, 1991 followed by a work disability based upon a thirty percent (30%) permanent partial general disability.

Respondent argues that the claimant's award should be limited to functional impairment only, based upon claimant's refusal to do accommodated work at a comparable wage. This argument is supported by the holding in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). In the Foulk decision, the Court of Appeals ruled that the presumption of no work disability should apply when a claimant rejects offered employment at a comparable wage which the claimant has the ability to perform. In this case, claimant disputes that he was able to perform the accommodated employment offered.

Claimant was released to return to light-duty employment following his back surgery. In January 1991 claimant was given an accommodated job performing general cleanup duties, primarily consisting of squeegeeing the floor and pushing a broom. Claimant continued to perform this accommodated job until June 4, 1991 when he was asked to take a temporary two to four (2-4) week assignment performing the same job duties on second shift. This would mean claimant would temporarily change from the day shift, which he had been working from approximately 7 a.m. to 3 p.m., to the next shift where his hours would be approximately 3 p.m. to 11 p.m. Although claimant later contended that his reason for refusing this shift change which resulted in his termination was due to the fact that he felt he would be unable to continue working due to pain, the evidence presented by respondent through the testimony of the company nurse, Janet Kilgore, and Exhibit A to that deposition consisting of a report written by claimant's supervisors, Steve James and Dean Aragon, convinces the Appeals Board that the primary reason for claimant's refusal to accept the accommodated position was his desire not to work second shirt. Although the second shift job could include some duties which were different from those he had been performing on first shift, the evidence indicates that the job offered was within the restrictions placed upon claimant at that time and that the employer was making a good-faith effort to accommodate those restrictions.

The Court of Appeals in the Foulk decision considered the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e(a) to apply where a worker unreasonably refuses to engage in work at a comparable wage where the proffered job is within the worker's ability. In so holding, the Court of Appeals found that the legislature did not intend for a worker to receive work disability where the worker was still capable of earning nearly the same wage. In this case, although the accommodated job offered by the respondent would pay claimant a wage comparable to the average weekly wage he was earning, this does not mean that the claimant is capable of earning a comparable wage in the open labor market. The record contains the testimony, medical records and/or reports of several physicians who have recommended varying restrictions. The Appeals Board finds the opinions of Dr. John Jarrott, Dr. G.W. Schoenhals and Dr. Robert A. Rawcliffe to be more credible and persuasive than those given by Dr. Richard W. Loy, Dr. M.J. Baughman and Dr. Neonil Tejano. Even so, the vocational testimony as contained in the report of James Molski convinces the Appeals Board that the claimant has a significant loss of access to the open labor market and loss of ability to earn a comparable wage. The Appeals Board

finds that the presumption of a work disability contained in K.S.A. 1990 Supp. 44-510e(a) has been overcome in this case. Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993).

Claimant argues that the evidence shows that the claimant is essentially unemployable and that the claimant is therefore entitled to an award based upon a permanent total disability. See Wardlow v. ANR Freight Systems, Inc. and Cigna Insurance Co., 19 Kan. App. 2d 110, 872 P.2d 299 (1993). The evidence in this case which would suggest a finding similar to that reached by the Kansas Court of Appeals in Wardlow comes primarily from the testimony of the claimant and from the report of James Molski when utilizing the opinions and restrictions given by Dr. Loy. The Appeals Board, as previously stated, is not persuaded by this testimony. Furthermore, in Wardlow the employer did not offer claimant an accommodated job at a comparable wage. It is a fundamental goal of the Kansas Workers Compensation Act to return an injured worker to gainful employment whenever possible. See K.S.A. 1990 Supp. 44-510g. Furthermore, employers are encouraged to accommodate injured and handicapped employees so as to accomplish this purpose. Recognition should be given to the employer's offer of a comparable wage job and the claimant's refusal to accept that position. Accordingly, the Appeals Board will impute the comparable wage which the claimant would have earned had he accepted the respondent's offer of an accommodated position to find that he has no wage loss for purposes of that prong of the two (2) part work disability tasks contained in K.S.A. 1990 Supp. 44-510e(a) which pertains to the extent to which his ability to earn comparable wages has been reduced.

The Appeals Board generally agrees with the findings by the Administrative Law Judge in adopting the opinions of Mr. Molski. However, the Appeals Board disagrees that the opinions of Mr. Molski would establish that claimant suffers a seventy percent (70%) loss of access to the open labor market. When limiting his opinions regarding labor market loss only to those which are based upon the restrictions that are generally in keeping with the restrictions given by the more credible of the physicians who expressed opinions in this case, we find the labor market loss to be sixty percent (60%). As the Kansas Court of Appeals has said:

> "The ultimate decision concerning the extent and nature of the disability is one which must be made by the trial court on the basis of the evidence presented. As we pointed out earlier, the trial court is not bound by the medical evidence presented in the case and has the responsibility of making its own determination."
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> "The trial court has the right and the obligation to weigh the evidence to determine the credibility of the witnesses, including the physicians who testified, and utilize that as a factor in making its decision." Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board's mandate is to apply de novo review to both findings of fact and conclusions of law. In so doing, the Appeals Board finds the claimant's functional impairment to be twenty-five percent (25%) and the labor market loss suffered by claimant to be sixty percent (60%).

The Appeals Board further agrees with the finding by the Administrative Law Judge to use the formula approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d

1011 (1990). Although not required to do so, the Appeals Board finds no compelling reason not to give both prongs of the two (2) part work disability test equal weight by averaging claimant's sixty percent (60%) labor market loss with his zero percent (0%) wage loss. In so doing, the Appeals Board finds that claimant has proven a thirty percent (30%) work disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(2) The Appeals Board finds that claimant has not met his burden of proving that the medical expenses incurred with Dr. Baughman, including the prescription medications, should be considered authorized treatment based upon claimant's allegation that respondent was not furnishing medical treatment. The evidence is that the respondent did furnish the claimant with medical treatment when necessary and that the treatment provided was neither unreasonable nor inappropriate under the circumstances. Therefore, the findings and conclusions made by the Administrative Law Judge as to medical treatment are approved and adopted by the Appeals Board for this review.

All other findings and conclusions made by the Administrative Law Judge which are not inconsistent with the findings and conclusions of the Appeals Board herein are hereby adopted by the Appeals Board as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson dated July 28, 1994 should be, and hereby is, modified as follows:

An award of compensation is hereby made in accordance with the above findings in favor of the claimant Pedro Silva, Jr., and against respondent, National Beef Packing Company, and its insurance carrier, ITT Hartford, for an accidental injury occurring on July 6, 1990 and based upon an average weekly wage of $334.90 for 35.86 weeks of temporary total disability at the rate of $223.28 per week or $8,006.82, followed by 11.71 weeks of permanent partial disability at $55.82 or $653.65 for a 25% permanent partial functional disability through June 4, 1991, followed by 367.43 weeks at $66.98 or $24,610.46 for a 30% permanent partial general disability, making a total award of $33,270.93. As of November 22, 1995 there would be due and owing to the claimant 35.86 weeks temporary total compensation at $223.28 per week in the sum of $8,006.82 followed by 11.71 weeks of permanent partial disability at $55.82 or $653.65 plus 233.14 weeks permanent partial compensation at $66.98 per week in the sum of $15,615.72, for a total due and owing of $24,276.19 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of $8,994.74 shall be paid at $66.98 per week for 134.29 weeks or until further order of the Director.

Claimant is awarded $350.00 as unauthorized medical expenses.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Future medical shall be awarded only upon proper application to and approval of the Director.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid direct as follows:

Underwood & Shane Preliminary Hearing	$ 97.60
Underwood & Shane Preliminary Hearing	$ 73.30
Underwood & Shane Preliminary Hearing	$109.30
Tri State Reporting Regular Hearing	$197.40
Tri State Reporting Deposition of Janet Kilgore	Unknown
Tri State Reporting Deposition of Pedro Silva, Jr.	Unknown
Court Reporting Service Deposition of Dr. Jarrott	$ 78.50

IT IS SO ORDERED.

Dated this ____ day of November 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Harold K. Greenleaf, Liberal, KS
James H. Morain, Liberal, KS
Thomas F. Richardson, Administrative Law Judge
Philip S. Harness, Director